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Potlatch

November 29, 2007

Janet Magnuson
USEPA Region 10
1200 Sixth Avenue
Mail Code: ORC-158
Seattle, WA 98101

Re: Avery Landing Site

Dear Ms. Magnuson:

This responds to EPA's October 28, 2007 letter concerning the Avery Landing Site (Site) in Shoshone County, Idaho. This is to inform you that Potlatch Forest Products Corporation (Potlatch) is willing to enter into good faith negotiations with EPA for a Consent Order to perform an EE/CA. However, in doing so, Potlatch reserves all rights to recover all costs from EPA pursuant to 42 USC § 9606(b) and all costs from other potentially responsible parties (PRPs) pursuant to 42 USC §§ 9607 and 9613. Further, you should be aware that no matter what the results of the EE/CA, Potlatch is not willing to fund the entire cleanup of the Site, if a cleanup is undertaken. Potlatch did not cause the contamination at the Site and a significant portion of the contamination is not located on Potlatch's property. Such contamination continues to migrate onto Potlatch's property.

Alternatively, because Potlatch has legitimate defenses to liability as set forth in the Attachment and to avoid costly litigation with EPA and other federal agencies, it is appropriate for EPA to enter into a *De Minimis* settlement with Potlatch pursuant to 42 USC § 9622(g) and EPA policies.

Potlatch has acted responsibly at the Site since it was acquired from the Chicago, Milwaukee, St. Paul & Pacific Railroad (Railroad) in May 1980, as more particularly described in the Attachment. Potlatch was unaware of the subsurface contamination at the Site when it was acquired and Potlatch never disposed of hazardous substances at the Site. When subsurface contamination was discovered in 1988, Potlatch investigated the Site and entered into a Consent Order with the state of Idaho. Potlatch has already expended significant resources in attempting to clean up the Site under the supervision of the Idaho Department of Environmental Quality (IDEQ).

We recognize that EPA believes Potlatch is a potentially responsible party (PRP) under CERCLA and the Clean Water Act because it currently owns a portion of the Site. However, as set forth in the Attachment, Potlatch has legitimate defenses to future

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liability at the Site. Nevertheless, Potlatch is willing to continue to act responsibly at the Site by entering into good faith negotiations for a Consent Order to perform an EE/CA or a *de minimis* settlement. In doing so, Potlatch expects EPA to pursue other PRPs identified in the Attachment to assist in any cleanup. Potlatch also requests that EPA expend federal funds on cleaning up the Site if warranted by the EE/CA.

Please contact our outside counsel, Kevin Beaton, at (208) 387-4214 at your convenience to discuss the next steps in the negotiation of a Consent Order or settlement agreement.

Sincerely,

Pamela Mull

cc: Mark Benson
Jim Newberry
Toni Hardesty
Kevin J. Beaton
Beth Ginsberg

ATTACHMENT

AVERY LANDING SITE
SHOSHONE COUNTY, IDAHO

I. Potlatch's History at the Site.

Based on currently available information, the following summarizes Potlatch's history at the Avery Landing Site.

In 1979, Potlatch entered into negotiations with the Chicago, Milwaukee, St. Paul and Pacific Railroad (Railroad) to acquire a number of rail lines in Northern Idaho. At the time, the Railroad was experiencing financial difficulties, had filed for bankruptcy in the United States District Court for the Northern District of Illinois (Case No. 77-B-8999) and desired to divest itself of all of its western rail lines. In fact, concern about the financial viability of the Railroad had motivated the United States Congress to pass legislation in 1979 to provide for the orderly reorganization of the Railroad. *See* Public Law 96-101, 1979 (S 1905).

Since the purchase of the Idaho rail lines had to be approved by the Bankruptcy Court, Potlatch hired a reputable appraisal firm from North Idaho in 1979 to evaluate all of the North Idaho rail lines and related Railroad properties. The Avery Landing Site (Site) was only a very small part of the transaction. That Site is located on Lot 4, Section 15, Township 45 North, Range 5 East, and on Lot 1 of Section 16, Township 45 North, Range 5 East. Potlatch owns a portion of Lot 1 in Section 16. During the appraisal process, contamination at the Site was not discovered. The fact that the subsurface contamination at the Site was not discovered at the time is not surprising as Potlatch has since learned that EPA and state personnel were at the Site in the 1970s in connection with issuance of a NPDES Permit to the Railroad for industrial discharges to the St. Joe River and the government inspectors did not document any concern about contamination at the time either.

A fair market value was arrived at for the Railroad properties with the bankruptcy trustee and sale of the rail lines was approved by the bankruptcy court. There is no evidence in the record that would suggest the fair market value of the Avery site or any of the other properties were reduced because of concerns about contamination. A quit claim deed was executed by the parties in May 1980. *See* attached **Exhibit A**.

The Site was located on what was described as the Avery to St. Maries Line. The Railroad had acquired a Right of Way to operate the Avery-St. Maries Line from the United States pursuant to the General Railroad Right of Way Act of 1875 in a grant and Filing in 1907 which was approved by the United States Department of Interior. The Right of Way ran through the Avery Site in both Sections 15 and 16. As discussed below, Potlatch now believes it never acquired any portion of the Site located in Section 15. When Potlatch acquired the Site, there were a number of buildings and structures at

the Site. Also there was a large above ground storage tank located in Section 15 at the Site. Potlatch never intended to operate the Avery line as a public carrier but rather intended to use it to transport Potlatch timber to its sawmill in St. Maries. We are uncertain whether Potlatch actually operated the St. Maries-Avery Line; however we do know that Potlatch began to remove structures and rail lines shortly after the acquisition.

In 1984-1985 the United States Department of Transportation, Federal Highway Administration (FHA) expressed interest in acquiring portions of the Avery Site in Section 15 and Section 16 to construct Highway 50. By that time the Avery-St. Maries Line was no longer operating and Potlatch had removed most of the tracks. Further, Potlatch had dismantled most of the structures on the Site. Again there was no documented evidence of the subsurface contamination at that time. The above ground storage tank in Section 15 was located on property that the FHA intended to use to construct Highway 50. Since the portion of the Railroad's right of way that ran through Section 15 at the Site had been abandoned, it was not entirely clear who owned the above ground storage tank or the underlying property at the time. Pursuant to federal law, a railroad right of way acquired pursuant to the 1875 Act reverts to the United States or to the adjacent property owner upon abandonment of the right of way. *See* 42 USC § 912. Because of the Railroad Bankruptcy proceedings, the St. Maries to Avery Line may have already been abandoned when Potlatch acquired it from the Railroad and therefore Potlatch never owned any right of way or other property in Section 15. However, because of the uncertainty of ownership of the Section 15 parcel at the time, Potlatch agreed with the FHA to dismantle the tank in 1986. According to records available at the time, it appears that there was a minor amount of water and diesel remaining in the tank.

The FHA instituted a condemnation action in the United States District Court, District of Idaho in the spring of 1986. The FHA took the position in the litigation that at the time of the condemnation action the Theriault family owned Lot 4 of Section 15 at the Site including the area where the above ground storage tank was located. The FHA also condemned portions of Section 16 at the Site which was owned by Potlatch. *See* attached **Exhibit B**. As part of the resolution of the condemnation action, the FHA agreed to pay Potlatch for the cost of the above ground storage tank removal.

In 1988, IDEQ responded to a citizen complaint that there was an oil sheen in the St. Joe River in the area of the Site. Apparently the sheen was being caused by petroleum seeping into the River from under the Site. IDEQ notified Potlatch about the sheen. Potlatch hired a consultant to investigate the Site. Although IDEQ attempted to involve the adjacent property owner, the FHA and the Railroad (which was then known as "CMC Heartland Partners") in the Site investigation and clean up, Potlatch ended up being the only party that undertook the responsibility of investigating and attempting to remediate the Site.[1]

[1] Because CMC Heartland Partners was in bankruptcy at the time both the State of Idaho and Potlatch agreed to settle their claims against the Railroad/CMC Heartland Partners for $60,000.00.

The investigation of the Site revealed that there was significant petroleum contamination at the Site underlying Section 15 that was migrating onto Potlatch's property in Section 16 and into the St Joe River. As far as could be discerned, it appeared that the contamination was likely caused by the Railroad's fueling operations adjacent to the above ground storage tank and possibly due to underground leaking of the lines. The investigation also revealed that there may be a discrete area of contamination on Section 16 that may have been associated with the Railroad's prior operation of the Roundhouse.

Potlatch entered into a Consent Order with IDEQ in 1994. The IDEQ Consent Order only required that Potlatch address contamination on the Section 16 property owned by Potlatch. Potlatch undertook a number of remediation strategies at the Site pursuant to the Consent Order including a petroleum recovery system and later the construction of an impermeable wall adjacent to the St. Joe River. Potlatch has already expended significant money in undertaking the various remediation activities at the Site under IDEQ's supervision. Even though the impermeable wall ultimately proved to be unsuccessful in permanently stopping any petroleum seeps into the St. Joe River, Potlatch's efforts have been successful in substantially eliminating any impacts to the St. Joe River.

II. Potlatch's Potential Liability Under CERCLA and the Clean Water Act.

As indicated in the Site history, *supra*, Potlatch acquired a portion of the Site in 1980 prior to the passage of CERCLA. Potlatch recognizes that CERCLA liability has been construed by federal courts to be retroactive and that current owners of contaminated sites are potentially liable, but Potlatch nevertheless has legitimate defenses to any future liability at the Site.

A. Third Party Defense.

As noted, it appears that the contamination was caused solely by the Railroad during its operations at the Site prior to Potlatch's acquisition. When CERCLA was first passed in 1980, potentially responsible parties (PRPs) of contaminated sites could avoid liability if the contamination at a CERCLA facility was caused solely by a third party unless such contamination was caused in "connection with a contractual relationship" with the PRP. *See* 42 USC § 9607(b)(3). Because Potlatch acquired the Site from the Railroad after all contamination activities had occurred, the contamination did not occur in connection with any contractual relationship. Subsequent federal cases interpreting the so called "third party" defense have found that simply because a third party causing the contamination is in the chain of title does not preclude subsequent owners from asserting the defense. Rather the key inquiry under the defense is whether the third party caused the contamination "in connection with a contractual relationship" with the PRP. *See, N.Y. v. Lashins Arcade Company*, 91 F.3d 353 (2nd Cir. 1996); *Westwood Pharmaceuticals v. National Fuel Gas Dist.*, 964 F.2d 85 (2nd Cir. 1992); *Lincoln Properties Ltd. v. Higgins*, 823 F.Supp. 1528 (E.D. Cal. 1992); *American National Bank & Trust Company v. Harcros Chemicals, Inc.*, 997 F.Supp. 944 (N.D. Ill. 1998). Here it is clear that the Railroad's operations at the Site and its contaminating activities at the Site were NOT in

connection with any contractual relationship with Potlatch. Thus we believe Potlatch can legitimately assert the third party defense to any future liability at the Site.

Potlatch understands that EPA may take the position that simply because the Railroad is in the chain of title with Potlatch at the Site then Potlatch cannot assert the defense.[2] Nevertheless, the ability of Potlatch to assert the third party defense under these facts has not been settled by the Ninth Circuit or the United States District Court for the District of Idaho. The fact that Potlatch acquired the site prior to the passage of CERCLA and prior to the 1986 amendments to CERCLA which defined the scope of "contractual relationship"[3] under 42 USC § 9607(b)(3) supports our successful assertion of the defense in this matter.

B. Innocent Landowner Defense.

Alternatively, Potlatch may rely upon the "innocent landowner" defense which was established by Congress in the 1986 amendments to CERCLA. *See* 42 USC § 9607(b)(3). To successfully assert the innocent landowner defense, a current owner must demonstrate that it did not know or have any reason to know of the contamination at the Site at the time of acquisition. Since Potlatch acquired the Site prior to the passage of CERCLA, the standard for measuring the amount of pre-acquisition inquiry to investigate the Site required to successfully rely upon the innocent landowner defense was much less demanding in 1980 than would be the case if Potlatch had acquired the Site now or anytime after passage of CERCLA. *See HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F.Supp 318 (D.Md. 1993) (Due diligence standard must be judged by real estate practices which were in effect at the time of purchase).

As noted, Potlatch hired a reputable appraisal firm to evaluate all of the properties to be acquired from the Railroad prior to the acquisition. The subsurface contamination at the Site was not revealed during the appraisal process. Since the sale of the Idaho rail lines needed to be based on fair market value and be approved by the bankruptcy court, there was no suggestion at the time that there was a reduction in price in any of the properties due to contamination at the Site or any other property subject to the transaction. Thus for a 1980 real estate transaction in North Idaho, Potlatch exercised a commercially reasonable inquiry regarding the Site prior to the acquisition and had no reason to know of the subsurface contamination. Since both EPA and the state visited the site in the 1970s during active operations by the Railroad and they didn't identify concerns about contamination at the time adds further support to Potlatch's claim that it had no reason to know of the contamination.

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[2] We note that when the United States is a defendant in a CERCLA action it has apparently relied upon a similar interpretation of the third party defense as is being advanced by Potlatch herein. *See, United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263 (E.D. Cal. 1997).

[3] In 1986 Congress amended CERCLA to define "contractual relationship" to include "land contracts and deeds." *See* 42 USC § 9601(35)(A). The 1986 amendments to CERCLA do not preclude a PRP such as Potlatch from raising the Third Party defense for pre-1986 contractual arrangements or overturn the *Westwood Pharmaceuticals, supra*, line of cases.

A second component of the innocent landowner defense (as well as the third party defense) is that Potlatch must have exercised "due care" once contamination has been discovered. Potlatch's lengthy and responsible actions at the Site under the supervision of IDEQ after contamination was discovered in 1988 more than satisfy the due care standard under CERCLA.

There may be other defenses available to Potlatch under CERCLA at the Site including the so called "petroleum exclusion" and that liability for cleanup of the entire Site may be divisible in so far as the contamination on Section 15 (which Potlatch does not own) and the related harm may be distinct from any contamination that may have occurred on Section 16.

C. Clean Water Act Liability.

Assuming arguendo the applicability of the Clean Water Act and the Oil Pollution Act (OPA) to the sheen in the St. Joe River, it is clear that Potlatch is not liable under the Clean Water Act or the Oil Pollution Act.

The liability scheme under the Clean Water Act and the OPA is not any broader than under CERCLA. Since the contamination at the Site and related oil sheen in the St. Joe River were caused solely by a third party and Potlatch has acted responsibly since discovery of the oil sheen, Potlatch is not liable under the Clean Water Act or OPA. *See* 33 USC § 1321(f) (Owner or operator of a facility is not liable for discharges of oil caused by an act or omission of a third party).

III. Other Potentially Responsible Parties.

It is clear that the Railroad is the principal PRP for the Site. We understand and appreciate that EPA has filed a claim for the Avery Site in the most recent bankruptcy filed by CMC Heartland Partners. Potlatch believes that the most equitable manner to address this Site in light of the unique circumstances presented is for EPA to fund the bulk of the cleanup/removal action and to pursue CMC in the bankruptcy proceeding for cost recovery.

We also believe that EPA should consider pursuing other PRPs to assist in the cleanup under its broad authority under CERCLA and the Clean Water Act. For example, the FHA obtained ownership of a portion of the Site in both Section 15 and 16 in 1986 to construct Highway 50. At this time we do not know what type of due diligence the FHA undertook prior to the acquisition but do note that CERCLA had already been passed and interpreted by numerous courts prior to the FHA's acquisition. Also it is not known whether during construction of the Highway, the FHA or its contractors may have caused or contributed to the release of hazardous substances at the Site. Apparently, the FHA has since provided an easement to Shoshone County to operate and maintain Highway 50. *See* **Exhibit C**.

The FHA may assert defenses to liability at the Site. For example, the FHA refused the state of Idaho's request to participate in the remediation from 1988-1994, claiming sovereign immunity defenses to state liability. Even though a sovereign immunity defense is not available to the FHA under CERCLA or the Clean Water Act, it is possible that the FHA may claim it is immune from liability under CERCLA since it acquired portions of the Site pursuant to a condemnation proceeding. *See* 42 USC § 9601(20). However, it is important to note that the 1986 amendments to CERCLA that provided immunity to governmental entities that acquired contaminated sites pursuant to condemnation proceedings was passed by Congress AFTER the FHA acquired property at the Site. Thus we do not believe the FHA can rely upon the condemnation defense to liability under CERCLA. Moreover, as noted above, it is possible that the FHA or its contractor may have caused the release of hazardous substances at the Site during construction of Highway 50.

EPA should also pursue the United States government as owner of the right of way at the Site. It is not clear to Potlatch which agency of the federal government would be the responsible owner of the right of way but note that both the United States Forest Service and the Department of Interior claimed some role in overseeing the Railroad's operations on the Right of Way shortly after the Railroad began operations.

Pursuant to the General Railroad Right of Way of 1875, it has been determined that a Railroad only acquires a right of way or easement in such property and that the United States retains fee ownership of the property. *See Great Northern Ry. Co., v. United States*, 315 U.S. 262 (1942). (Railroad only acquired an easement by its filing of a right of way under General Right of Way Act of 1875, not a fee interest, and therefore the United States retained the mineral rights underlying the right of way). *See also State of Idaho v. Oregon Short Line Ry. Co.*, 617 F.Supp. 207 (D. Idaho 1985). (United States retained some property interest in right of way claimed by railroad under 1875 Act until abandonment).

Since all of the hazardous disposal activities occurred at the Site during the Railroad's operations at the Site and at the time when the United States retained an ownership interest in the right of way, we believe that the United States should be considered a "prior owner" under CERCLA since it owned the property at the Site at the time of disposal. *See* 42 USC § 9607(a)(2).[4] We are unaware of any judicial decisions that have determined whether the United States could be found liable under CERCLA for disposal activities occurring by a railroad on rights of way perfected under the 1875 Act. We also understand that the Untied States might resist liability under CERCLA for contamination

[4] We must note that the United States continues to take the position that it retains a reversionary interest in a railroad right of way under the 1875 Act in defending recent taking claims brought by adjacent property owners. However, recent cases have found that the adjacent property owners own the right of way upon abandonment and can maintain a takings claim against the United States for converting such rights of way to public trails. *See, Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). This case does not resolve the United States' liability for contamination that occurred on a railroad right of way during railroad operations and prior to abandonment.

that occurred during its fee ownership of railroad rights of way. However, we believe that EPA should pursue this matter with the appropriate federal governmental entity. Again it is not fair or appropriate for Potlatch to incur the burden of cleanup of the Site when the federal government appears to be liable for contamination at the Site under the broad liability scheme under CERCLA.

Finally, we believe EPA should pursue any other past and present owners of the Site to share in the burden of the clean up. Unlike EPA, Potlatch is not in a position to determine whether such owners are able to assist in the clean up.